Sykt Pembenaan Raya Sdn Bhd v Langkawi Marble Co Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-2470 OF 1989
ABDUL AZIZ J
28 AUGUST 1997

Civil Procedure *— Appeal — Notice of — Reinstatement, application for — Whether late service of notice of appeal to respondent results in appeal not being brought — Whether dismissal of action is proper result when notice of appeal not served within statutory period — Rules of the High Court 1980 O 56 r 1(2) & (3)*

Words and Phrases *— 'Brought' — Rules of the High Court 1980 O 56 r 1(2)*

The plaintiffs filed a notice of appeal with the court within the five-day time period stipulated in O 56 r 1(3) of the Rules of the High Court 1980 ('the RHC'). After entering the hearing date, the senior assistant registrar signed and sealed the notice. On the same day, the plaintiffs served the defendant an unsealed, unsigned copy of the notice which did not bear the date of the hearing.

On the date of the hearing, neither side was present; the defendant was absent because it did not know of the hearing date, and the plaintiffs were absent because their solicitor had failed to record the hearing date in his diary. The notice of appeal was thus struck out by the court.

About four months later, the plaintiffs applied for reinstatement of the appeal. The defendant raised a preliminary objection by arguing that because the plaintiffs had failed to serve the defendant two days before the hearing date as required in O 56 r 1(3), the plaintiffs had therefore not brought an appeal according to the meaning of 'brought' in O 56 r 1(2) of the RHC and hence there was nothing for the court to reinstate.

The plaintiffs argued that r 1(3) of O 56 did not specify that the sealed copy had to be served two days before the hearing date, so there was proper notice.

Held, reinstating the appeal and dismissing the preliminary objection:

(1) The plaintiffs' argument that O 56 r 1(3) of the RHC does not require the sealed copy to be served at least two days before the hearing date lacked merit. It is clear that the notice to be served is the one which is 'issued' by the court (see p 206F); *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344 followed.

(2) The submission that unless the notice of appeal was issued and served according to the time prescribed in O 56 r 1(3), the appeal could not be said to have been 'brought' was inaccurate. This placed too much significance on the word 'brought'. The word 'brought' is employed in r 1(2) as an appropriate word, as a matter of style, to be employed for conveying the essential

instruction that the paragraph seeks to convey: the steps one needs to take if one wishes to take a matter up on appeal. Thus, r 1(2) requires one to inform the other party of one's intention to appeal by serving on him notice in Form 114 (see pp 206H–I and 207A–E); *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 distinguished.

(3) Paragraph (3) of O 56 r 1 states that the notice must be issued within five days after the judgment, order or decision appealed against was given or made. The issued notice must be served on the respondent at least two days before the hearing date. The purpose of the five-day period is to ensure that the respondent is not subject to appeal indefinitely, and the purpose of the two day period is to ensure that the respondent would have time to prepare its case. While it may be just to bar the appellant from appealing if it missed the five-day period, it would be wrong to rule that the appeal was not brought and to strike off the appeal when the default pertained to the time of service. Such a consequence would bear no relationship with the purpose of the service time requirement. Instead, when there is non-compliance with the service time, the question which should arise is whether the court should fix or refuse to fix another hearing date. Fairness to the respondent and the appellant's lack of diligence in serving the notice of appeal would be grounds for refusal. At least, another date should be given, in which case service of the notice must be effected as least two full days again before that date. If service cannot be effected before that date, the appellant must file an affidavit as to the reasons for the failure so that the court will have some material on which to consider whether to grant another date (see pp 207F–I and 208A–G).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan notis rayuan dengan mahkamah dalam tempoh lima hari yang disyaratkan dalam A 56 k 1(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Selepas memasukkan tarikh pembicaraan, penolong kanan pendaftar menandatangani dan memeteraikan notis. Pada hari yang sama, plaintif-plaintif menyampaikan salinan notis yang tidak bermeterai dan tidak ditandatangani serta tidak membawa tarikh pembicaraan kepada defendan.

Pada tarikh pembicaraan, tidak satu pihak pun telah hadir; defendan tidak hadir kerana ia tidak tahu tentang tarikh pembicaraan, dan plaintif-plaintif tidak hadir kerana peguamcara mereka gagal merekodkan tarikh pembicaraan dalam buku catatan beliau. Justeru itu, notis rayuan dibatalkan oleh mahkamah.

Lebih kurang empat bulan kemudian, plaintif-plaintif memohon supaya rayuan dihidupkan semula. Defendan membangkitkan bantahan permulaan dengan menghujahkan bahawa oleh kerana plaintif-plaintif telah gagal menyampaikan defendan dua hari sebelum

tarikh pembicaraan seperti yang dikehendaki dalam A 56 k 1(3), plaintif-plaintif dengan itu telah tidak membawa rayuan menurut maksud 'dibuat' dalam A 56 k 1(2) KMT dan justeru itu tiada apa-apa untuk dihidupkan semula oleh mahkamah. A

Plaintif-plaintif menghujahkan bahawa A 56 k 1(3) tidak menetapkan bahawa salinan bermeterai hendaklah disampaikan dua hari sebelum tarikh pembicaraan, maka terdapat notis yang wajar. B

Diputuskan, menghidupkan semula rayuan dan menolak bantahan permulaan:

(1) Hujah plaintif-plaintif bahawa A 56 k 1(3) KMT tidak memerlukan salinan meterai disampaikan sekurang-kurangnya dua hari sebelum tarikh pembicaraan tidak mempunyai merit. Adalah jelas bahawa notis untuk disampaikan adalah notis yang 'dikeluarkan' oleh mahkamah (lihat ms 206F); *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344 diikut. C

(2) Hujah bahawa melainkan notis rayuan dikeluarkan dan disampaikan menurut tempoh yang ditetapkan dalam A 56 k 1(3), rayuan tidak boleh dikatakan telah 'dibuat' adalah tidak tepat. Ini meletakkan terlalu banyak keutamaan pada perkataan 'dibuat'. Perkataan 'dibuat' digunakan dalam k 1(2) sebagai perkataan yang wajar, sebagai gaya, untuk digunakan bagi menyampaikan arahan yang ingin disampaikan oleh perenggan tersebut: langkah-langkah yang perlu diambil sekiranya seseorang ingin merayu. Justeru itu, k 1(2) menghendaki seseorang memberitahu pihak yang lain tentang hasratnya untuk merayu dengan menyampaikan notis dalam Borang 114 (lihat ms 206H–I dan 207A–E); *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 dibeza. D E F

(3) Perenggan (3) A 56 k 1 menyatakan bahawa notis mestilah dikeluarkan dalam tempoh lima hari selepas penghakiman, perintah atau keputusan rayuan terhadapnya itu telah diberi atau dibuat. Notis yang dikeluarkan mestilah disampaikan kepada penentang sekurang-kurangnya dua hari sebelum tarikh pembicaraan. Tujuan tempoh lima hari adalah untuk memastikan penentang tidak tertakluk kepada rayuan untuk tempoh yang tidak tentu, dan tujuan tempoh dua hari adalah untuk memastikan bahawa penentang mempunyai masa untuk menyediakan kesnya. Walaupun ia kelihatan adil untuk menghalang perayu daripada merayu sekiranya ia terlepas tempoh lima hari, adalah salah untuk memutuskan bahawa rayuan tidak dibuat dan untuk membatalkan rayuan apabila keingkaran adalah berhubung dengan masa penyampaian. Akibat sedemikian tiada kena-mengena dengan tujuan keperluan masa penyampaian. Sebaliknya, apabila terdapat ketidakpatuhan masa penyampaian, persoalan yang harus timbul adalah sama ada mahkamah harus menetap atau enggan menetap tarikh pembicaraan yang lain. Keadilan kepada penentang dan sikap berat tulang perayu dalam menyampaikan notis rayuan akan menjadi alasan penolakan. G H I

A Sekurang-kurangnya, tarikh yang lain patut diberikan, dan jikalau begitu penyampaian notis mestilah dilaksanakan sekurang-kurangnya dua hari penuh sekali lagi sebelum tarikh itu. Andainya penyampaian tidak boleh dilaksanakan sebelum tarikh itu, perayu mestilah memfailkan afidavit atas sebab kegagalan supaya
B mahkamah akan mempunyai bahan bagi mempertimbangkan sama ada tarikh lain harus diberi (lihat ms 207F–I dan 208A–G).]

Notes

For a case on reinstatement of a notice of appeal, see 2 *Mallal's Digest*
C (4th Ed, 1994 Reissue) para 571.

Cases referred to

Ooi Chew Seng v Ultratech Sdn Bhd & Ors [1997] 2 MLJ 344 (folld)
Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 (distd)
D *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 (not folld)

Legislation referred to

Rules of the High Court 1980 O 56 r 1(2), (3)

E

James Monteiro (*Shearn Delamore & Co*) for the plaintiff.
Shanti Segaran (*Mahadevi Nadchatiram & Partners*) for the defendants.

Cur Adv Vult

F **Abdul Aziz J**: On 5 June 1996, the learned senior assistant registrar, on the application of the first defendant, dismissed the plaintiff's action for want of prosecution.

On 7 June, the plaintiffs filed a notice of appeal to the judge in chambers. The senior assistant registrar signed and sealed the notice on
G the same day after entering in it the date of hearing, 12 August. Also on the same day, the plaintiff's solicitors served on the solicitors for the first defendant an unsealed and unsigned copy of the notice of appeal which, of course, did not bear the date of hearing.

As the sealed copy of the notice of appeal was not served on the
H solicitors for the first defendant before the hearing date, it was not aware of the date.

When the appeal came up for hearing on 12 August, neither side was present. So I struck out the notice of appeal. I did that on the assumption that the absence of the plaintiff's solicitors meant that the plaintiff was not
I interested to pursue the appeal.

The plaintiff, by summons in chambers dated 31 January 1997, now applies for reinstatement of the appeal. In his affidavit, the solicitor having charge of the case for the plaintiff explains that the date of hearing of the appeal had not been recorded in the diary of his firm and therefore he was

not aware of the date. Thus, the absence of counsel for the plaintiffs on 12 August 1996. Since what I did on that date was to strike out the notice of appeal, the application is really an application for reinstatement of the notice of appeal.

On the hearing of the application, a preliminary objection was raised by learned counsel for the first defendant. It is founded on paras (2) and (3) of r 1 of O 56 of the Rules of the High Court 1980. Those paragraphs provide as follows:

> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

Since in this case there was a failure to serve the notice of appeal not less than two clear days before 12 August 1996, the day fixed for hearing the appeal, as required by para (3), learned counsel for the first defendant, on the authority of *Public Feedmill (M) Sdn Bhd (In liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34, which was followed in *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344, submitted that the appeal had not been 'brought' and therefore was not before the court. In consequence, there is nothing to reinstate and the plaintiff's application should be dismissed.

Learned counsel for the plaintiff submitted that para (3) does not say that it is the sealed copy that must be served at least two clear days before the day fixed for hearing the appeal. There is no merit in that submission. The notice to be served is the notice that is 'issued' and, as was decided in *Ooi Chew Seng*, 'issued' in para (3) means issued by the court.

Learned counsel for the plaintiff further submitted that the reason why VC George J in *Public Feedmill* allowed the preliminary objection and struck off the appeal was because the respondent in that appeal had, for over a year, not realized that the appellant had filed an appeal. It was therefore submitted that in this case, as the first defendant was aware, even from the date when the notice of appeal was filed, that the plaintiffs were appealing, the preliminary objection ought not to be upheld.

It is true that at p 39E–G of the judgment, VC George J explained why it is salutary that the notice of appeal should be served, as he put it, 'within a prescribed period'. It is so that the respondent will not be left unaware of the appellant's intention to appeal. But the reason VC George J struck off the appeal was because, in his view, the appeal could not be said to have been 'brought'. According to him, unless the notice of appeal is issued and served according to the time prescribed in para (3), the appeal cannot be said to have been 'brought'. If that proposition is correct, and in a particular case para (3) has not been complied with as to service, I do not think it can be said that an appeal is nevertheless 'brought' if the respondent

A is otherwise aware of the appellant's intention to appeal or of the fact that he has filed a notice of appeal.

The case of *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73 cited by learned counsel for the plaintiff is irrelevant because it does not concern the B question of non-compliance with para (2) or (3).

Those are the only arguments advanced by learned counsel for the plaintiff in the hope of persuading me not to follow *Public Feedmill*. I do not find that they are sound arguments.

I nevertheless am unable to agree that failure to serve the notice not C less than two clear days before the day fixed for hearing the appeal results in no appeal having been brought, as if the notice of appeal that has been issued in time does not exist, so that there is, in this case, no appeal, or rather notice of appeal, to be reinstated. With respect, I think too much significance ought not to be placed on the word 'brought' in para (2) so that the mind is led to question whether an appeal has or has not been D brought should any of the requirements of the two paragraphs not be complied with. The word 'brought', I think, is employed in para (2) as an appropriate word, as a matter of style, to be employed for conveying the essential instruction that the paragraph seeks to convey, which is simply as to the steps one needs to take if one wishes to take a matter up on appeal. E Paragraph (2) requires one to inform the other party of one's intention to appeal by serving on him the notice in Form 114.

Paragraph (3) requires the notice to be issued within five days after the judgment, order or decision appealed against was given or made. It implies that the appellant must file the notice of appeal also within five days. The purpose of the time limit is obviously in order that the other side F will not be subject to an appeal indefinitely. He will know within the five days, by making a file search, whether the losing side intends to appeal. If the losing side fails to file the notice of appeal and have it issued within the five days, then, unless the court extends the time, the consequence will be that he becomes debarred or disqualified from appealing. Where the G notice is filed and issued in time, whether the appeal will be heard early or late depends on the court, which will fix the date in the notice of appeal. That is not controlled by para (3). Another requirement of para (3) is that the notice must be served not less than two clear days before the day fixed by the court. Now that requirement, in my opinion, is not for the purpose of enabling the respondent to know early that there is an appeal, because H the date of hearing may be several months from the date of issue of the notice. In this case, it was more than two months.

If the notice were served three days before the date of hearing, which would be all right, the respondent would still not have known early of the intention to appeal. If the intention was to give early notice, para (3) would I have provided that the notice must be served within a number of days after its issue. The purpose of service at least two clear days before the hearing date is to give sufficient time for the respondent to prepare and make himself ready for the appeal.

That being the purpose of the two-day service, the question that arises is what should be the consequence of failure to serve the notice as required by para (3). Even if it were a one-day service, there would be failure to comply with para (3). The consequence should be, if the respondent's counsel is present and complains about the short service, that another date be given so that he will have sufficient time to prepare for the appeal, and probably costs for the day should be ordered for the respondent's counsel. If he is willing to proceed with the appeal, the hearing should proceed. If the respondent's counsel is absent, another date should be given. But there would, in my opinion, certainly be no justification for ruling in such a case that because of the default as regards the time of service, the appeal is not brought — as if the notice of appeal were no longer valid — with the consequence that the appeal is struck off. Such a consequence would bear no relationship to what I believe to be the purpose of the time requirement as to service. There is, or should be, a purpose behind every procedural requirement, and the consequence of non-compliance with a requirement should be commensurate with the need to achieve the purpose of the requirement.

Equally, in my opinion, it would be wrong, where the default is in not serving the notice at all before the hearing date, to treat the matter as a case of an appeal not brought, with the result that, where counsel for the appellant appears on the date fixed, as he normally would, he would be told that that is the end of the matter, or he would have the notice of appeal struck out, because no appeal has been brought. The question that should arise in such circumstances is whether the court should fix another date of hearing or should refuse to fix another date of hearing, the refusal being on the ground that, because of the appellant's lack of diligence in serving the notice of appeal and in fairness to the respondent, the appellant should not be allowed to proceed further in the appeal and not on the ground that no appeal has been brought. At least, another date should be given, in which case service of the notice must be effected at least two full days again before that date. If service cannot be effected before that date, the appellant must file an affidavit as to the reasons for failure to serve so that the court will have some material on which to consider whether to grant another date.

For those reasons, I respectfully disagree that in this case there is no appeal to be reinstated by reason of no appeal having been brought. In any case, what is to be reinstated is the notice of appeal that I struck out, which had been issued in time. I therefore dismiss the preliminary objection.

Preliminary objection dismissed.

Reported by K Tang-Wai